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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1958

No. 187

EARL R. DEEN, *Petitioner*

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

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RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that the petition for certiorari be dismissed, or in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

The decision of the Supreme Court of Texas to which the petition for certiorari is directed, is correctly copied in the appendix to the petition for certiorari and appears in 312 S.W. 2d 933.

We cannot accept as being in all respects accurate

the petitioner's "Statement of the Matter Involved." Actually, of course, the actual happenings are a matter of record and neither our description of the mandate of the United States Supreme Court nor of the opinions of the Court of Civil Appeals and the Texas Supreme Court nor the descriptions thereof by petitioner can change what actually happened nor what is in those opinions. We respectfully refer to the opinions and proceedings in the respective courts for a full and accurate statement. Here we merely make a very brief summary.

On a jury verdict which found some issues in favor of the plaintiff and some issues in favor of the defendant, the District Court of Brown County, Texas, rendered judgment in favor of Earl R. Deen for $21,450.00. The Court of Civil Appeals at Eastland (275 S.W. 2d 529) found *no evidence* to support the jury's finding of negligence on the part of the railroad in failing to furnish proper tools and reversed and rendered. Deen applied to the Supreme Court of Texas for writ of error, which was denied. Deen then applied to the United States Supreme Court for certiorari, which was granted, and the Supreme Court of the United States (353 U.S. 925, 77 S.Ct. 715, 1 L.Ed. 721) reversed and remanded same to the Court of Civil Appeals in a per curiam opinion. Thereafter, the Court of Civil Appeals (306 S.W. 2d 171) held that it was precluded by the mandate of the Supreme Court of the United States, from exercising the jurisdiction given to it, to reverse and remand because of jury findings which were against the overwhelming weight and preponderance of the evidence, but did

require a remittitur of $5,500.00 and, when Deen filed that remittitur, affirmed the trial court judgment. The Santa Fe and Deen each applied for writ of error to the Texas Supreme Court, both writs were granted, and the Supreme Court of Texas (312 S.W. 2d 933) reversed and remanded the case to the Court of Civil Appeals with instructions to pass upon the question of whether the jury's finding was against the overwhelming weight and preponderance of the evidence. On motion by Deen, the Supreme Court of Texas recalled its mandate to the Court of Civil Appeals so that Deen might apply to this Court for certiorari.

Deen's petition for certiorari is directed at a judgment of the Supreme Court of Texas which remands the cause to the Court of Civil Appeals at Eastland for the determination by that court of the issue of whether or not the case should be reversed and remanded for a new trial because the jury's verdict was against the overwhelming weight and preponderance of the evidence. Furthermore, the Court of Civil Appeals can either reverse and remand for an entirely new trial of all issues on the merits or it can hold that the verdict was not against the overwhelming weight and preponderance of the evidence, in which case, of course, it would affirm the trial court's judgment subject to the remittitur. To summarize, this is a case remanded by the State Supreme Court to an intermediate appellate court, in which no judgment or decision has yet been made, and if the decision were made adverse to Deen it would be a remand for an entirely new trial on the merits. In such a situation

there is no conceivable way to construe this as other than a certiorari to a judgment which is not final.

Deen, in his petition for certiorari (p. 8), refers to the fact that the Supreme Court of Texas did not issue execution for costs in Deen's favor covering the costs in the United States Supreme Court taxed against the defendant, Santa Fe. The Supreme Court of the United States adjudged costs in the amount of $1,294.32 against Santa Fe. Deen is absolutely unjustified in saying that the Santa Fe ever questioned this liability for these costs in any court at any time. Item 13 in the record is "Reply to Demand for Execution" which shows the contrary positively and unequivocally. He is likewise in error in stating that the Supreme Court of Texas twice refused his application. He was advised by the clerk (March 17, 1958) that under *Texas Rules of Civil Procedure* 149, 436, 447 502 and 511, execution for costs would issue when the appeal was finally disposed of.

Of course, when the appeal is finally disposed of Deen will get his execution for costs and the Santa Fe will get its execution for costs, or the parties will get together to offset the cost bills and the Santa Fe will pay whatever difference there may be. It should be noted that Deen is very careful not to assert that the Supreme Court of Texas had any character of statutory or other authority to issue the execution he prayed for at the time he prayed for it. We think that this is sufficient reply to the petition for certiorari insofar as it applies to the question of getting out execution for costs.

JURISDICTION

The next question is jurisdiction. Jurisdiction is denied. There is no issue but that this action was brought under the Federal Employer's Liability Act by a railway employee engaged in interstate commerce against an employer engaged in interstate commerce. That fact does not make final a judgment which remands the case for further proceedings in the Court of Civil Appeals or, if Deen be correct, which remands it to the trial court for a trial on the merits. That is the exact holding of the Supreme Court of the United States in *Southern Pacific Co. vs. Charles M. Gileo*, 351 U.S. 493, 100 L.Ed. 1357, 76 S.Ct. 952, which dismissed writs in the Eufrazia and Eelk cases.

The judgment appealed from is not final and there is no basis for certiorari under 28 *U.S.C.A.*, Section 1257. Authorities on this point are presented below.

28 *U.S.C.A.* 1651 does not authorize certiorari to a State court. Insofar as it authorizes mandamus, this is covered by a separate petition for mandamus by Deen and a separate answer thereto by the Santa Fe.

QUESTIONS PRESENTED

1. Can the Supreme Court of the United States grant a writ of certiorari to the Texas Supreme Court on a judgment which merely remands the cause and is not final?

2. Did the mandate of this Court remanding this cause to the State court for further proceedings constitute an order by this Court to the Court of Civil

Appeals to affirm the judgment of the Trial Court?

3. Is the ordering of a new trial because a verdict is against the overwhelming weight and preponderance of the evidence a denial of a jury trial whether same be ordered by a trial or an appellate court?

4. Is there any provision of the United States Constitution or any statute enacted by Congress which exempts FELA suits filed in the State Courts from State rules of practice applicable to all other litigants?

STATEMENT AND AUTHORITIES ON JURISDICTION

That the Supreme Court's jurisdiction to grant certiorari to a State court is limited to final judgment is, of course, beyond question. 28 *U.S.C.A.*, Section 1257 expressly so provides and this Court has so stated at least a hundred times. Of those cases the following are only a respectable sample.

Southern Pacific Co. vs. Gileo, 351 U.S. 493, 100 L.Ed. 1357, 76 S.Ct. 952;

Gospel Army vs. Los Angeles, 331 U.S. 543, 91 L.Ed. 1662, 1665, 67 S.Ct. 1428;

Republic Natural Gas Co. vs. Oklahoma, 334 U.S. 62, 92 L.Ed. 1212, 68 S.Ct. 972;

Market Street R. Co. vs. Railroad Commission, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171;

Georgia R & P Co. vs. Decatur, 262 U.S. 432, 67 L.Ed. 1065, 43 S.Ct. 613;

Haseltine vs. Central National Bank, 183 U.S. 130, 46 L.Ed. 117, 22 S.Ct. 49;

Coe vs. Armour Fertilizer Works, 237 U.S. 413, 59 L.Ed. 1027, 35 S.Ct. 625;
Great Western Telegraph Co. vs. Burnham, 162 U.S. 339, 40 L.Ed. 991, 16 S.Ct. 850;
Louisiana Navigation Co. vs. Oyster Commission, 226 U.S. 99, 57 L.Ed. 138, 33 S.Ct. 78;
Bostwick vs. Brinkerhoff, 106 U.S. 3, 27 L.Ed. 73, 1 S.Ct. 15;
Zeller vs. Switzer, 91 U.S. 487, 23 L.Ed. 366;
U.S. vs. Krall, 19 S.Ct. 712, 174 U.S. 385, 43 L.Ed. 1017;
Johnson vs. Keith, 6 S.Ct. 669, 117 U.S. 199, 29 L.Ed. 888;
McComb vs. County Commissioners of Knox County, 91 U.S. 1, 23 L.Ed. 185;
Kimball vs. Evans, 93 U.S. 320, 23 L.Ed. 920;
M.K.I. Ry. Co. vs. Olathe, 32 S.Ct. 46, 222 U.S. 185, 56 L.Ed. 155;
Winn vs. Jackson, 12 U.S. (Wheat) 135, 6 L.Ed. 577;
St. Clair County vs. Lovingston, 85 U.S. 628, 21 L.Ed. 813;
C.M. & St. P. R. Co. vs. Bolch, 242 U.S. 616, 61 L.Ed. 529, 37 S.Ct. 211.

And a judgment which remands the case to a lower appellate court for further proceedings is just as lacking in finality as one that remands the cause to the trial court.

California National Bank vs. Stateler, 171 U.S. 447, 43 L.Ed. 223, 19 S.Ct. 6;
Davis vs. Crouch, 94 U.S. 514, 24 L.Ed. 281;

Laclede Gas Light Co. vs. Public Service Commission, 304 U.S. 398, 82 L.Ed. 1422, 58 S.Ct. 988;

Drake vs. Kochersperger, 170 U.S. 303, 42 L.Ed. 1046, 18 S.Ct. 942;

McGourkey vs. Toledo & O.C.R. Co., 146 U.S. 536, 36 L.Ed. 1079, 13 S.Ct. 170;

Union Mutual Life Insurance vs. Kirchoff, 160 U.S. 374, 40 L.Ed. 461, 16 S.Ct. 318.

The authorities cited by Deen. (Petition for Certiorari, p. 7) are not contrary to those above cited and not a single one of such cases deal with a State court proceeding which was remanded to the trial court (or lower appellate court) for further proceedings or trial on the merits.

For example, one of the cases is *Market Street R. Co. vs. R. R. Commission of Calif.*, 324 U.S. 548, 89 L.Ed. 1171 (supra), where the proposition is stated as follows:

> "Our jurisdiction to review a state court judgment is confined by longstanding statute to one which is final. Judicial Code, Sec. 237, 28 USCA Sec. 344, 8 FCA title 28, Sec. 344. Final it must be in two senses; It must be subject to no further review or correction in any other state tribunal: it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Was the judgment from which Deen has taken certiorari final? That judgment was a *remand* of the

case to the Court of Civil Appeals to adjudicate "whether or not a jury finding of negligence of the defendant in failing to furnish proper tools is so against the weight and preponderance of the evidence as to require new trial in the interest of justice, and upon the basis of said adjudication, to either affirm the judgment of the trial court or grant a new trial." (Opinion of Texas Supreme Court, 312 S.W. 2d p. 942)

Deen, in his petition for certiorari, at no time makes any good faith attempt to show that the foregoing is anything close to a final judgment. His half-hearted attempt (petition of certiorari p. 5) directed to that end is his statement (which is correct) that the Court of Civil Appeals following the decision of the Supreme Court did prepare an opinion remanding the cause to the trial court for a new trial, but as he further points out, that order was set aside by the Court of Civil Appeals on May 20, 1958 (Petition for Certiorari, p. 5). As far as jurisdiction is concerned, it makes no difference which position Deen takes. If the Supreme Court's judgment is a judgment remanding the cause to the Court of Civil Appeals, it is not a final judgment. If the Court of Civil Appeals' withdrawn opinion be considered as not withdrawn, then the cause was remanded to the trial court for a new trial and that is not a final judgment.

In Deen's petition for certiorari there are some rather wild statements (see Petition, pp. 13 and 14, for example) which have no character of justification, wherein he tries to indicate that when a new trial is

granted (by the trial or appellate court) he will not get a trial de novo. The Supreme Court of Texas' opinion in this case, of course, shows the contrary and it should be noted that Deen cites no authority for his position.

A new trial in Texas is a trial de novo. Since he cites no authority, we will satisfy ourselves with the following quotation from *Wichita Falls Traction Co. vs. Cook* (Comm. App.), 60 S.W. 2d 764 (opinion adopted by the Supreme Court) and we quote from page 768:

> "The granting of a new trial means that the case shall be reinstated upon the docket of the trial court and stand for trial the same as though no trial had been had. If the court thinks that the ends of justice have not been attained by the verdict of the jury, it is clearly its duty to set aside the judgment rendered on the verdict. Texas & P. R. Co. v. Casey, 52 Tex. 112.
>
> "A trial by a jury is a lawful right given to litigants, and, when that right has been invoked, the procedure incident thereto must be followed. It is the peculiar province of the jury to find the facts of the case, and no court has the right to substitute its own findings of fact and render judgment thereon in opposition to the findings of fact by a jury. It can only set aside the verdict of the jury and the judgment rendered thereon, the effect of which is to reinstate the case upon the docket in the same situation as it was before there was a trial."

As the Supreme Court of Texas in this case pointed out, the Court of Civil Appeals has the same jurisdic-

tion as the trial court, see for example, *Sanders vs. Harder* (Tex. Sup. Ct.) 227 S.W. 2d 206. Therefore, if the remand to the Court of Civil Appeals be ignored and this be treated as a remand to the trial court for a new trial, either way there is not a final judgment.

In *Metropolitan R. R. Co. vs. Moore*, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334, the Supreme Court of the United States had before it exactly the problem that the Texas Supreme Court has before it in the Deen case. In that case the trial court had overruled a motion for new trial based on the contention that the verdict was against the overwhelming weight and preponderance of the evidence. The intermediate appellate had refused to review the trial court's refusal to grant new trial because of the verdict being against the overwhelming weight and preponderance of the evidence and the Supreme Court of the United States making the exact distinction which the Supreme Court of Texas did between a jury finding based on "no evidence" and a jury finding against the overwhelming weight and preponderance of the evidence. We quote from that opinion:

> "It is urged in argument, however, that the error did not prejudice the plaintiff in error, because the court necessarily passed upon the same matter in considering and sustaining the ruling of the court at special term in refusing to instruct the jury to return a verdict in favor of the defendant upon the evidence offered by the plaintiff; but the question arising on this ruling, and that on the motion for a new trial at the conclusion of the whole evidence, were not identical. It might well be that on the plaintiff's evidence

there was a case sufficiently made out to submit to the jury, while on the whole testimony it might fairly be a question whether the verdict was not against the weight of the evidence, in that sense which would justify the court in granting a new trial. Of course nothing we have said in this opinion is to be construed as indicating any rule of decision in such cases, or is intended in the least to narrow the province of the jury as the proper tribunal for determining questions of fact in trials at common law. The relation of the court to the jury, together constituting the appointed tribunal for the administration of the law in such cases, is regulated by fixed and settled maxims. The legal discretion of the Supreme Court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the supreme court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence.

"For this error, the judgment of the Supreme Court of the District of Columbia at General Term is reversed, and the cause remanded, with directions to take further proceedings therein in conformity with this opinion."

Would anyone contend that the Supreme Court of the United States had entered final judgment in the Moore case? If it wasn't a final judgment in the

Moore case, then it isn't a final judgment in the Deen case.

That the Supreme Court of the United States issued a mandate to the Court of Civil Appeals in this case is unquestioned. That mandate does not make final a judgment which is not final, nor does it amend 28 *U.S.C.A.* 1257. Certiorari lies from a final judgment and not otherwise. If the judgment is not final, the fact that a mandate by this Court preceded it will not make it final.

Deen's further wild statement that if certiorari is not granted he will have no chance to have this Court review the decision of the Texas Supreme Court is, of course, completely untrue. See, for example, *Urie vs. Thompson*, 337 U.S. 163; 93 L.Ed. 1282, 69 S.Ct. 1018; and see *Southern Pacific vs. Gileo* (supra), *Gospel Army vs. Los Angeles* (supra); *Republic Natural Gas vs. Oklahoma* (supra).

Deen's last argument that 28 U.S.C.A., Section 1257, requiring finality in the State court judgments before this court can grant certiorari does not apply in F.E.L.A. cases that is presented on page 18 of the petition for certiorari where Deen's attorney states:

> "*Harsh v. Illinois Terminal R. R. Co.*, supra, is also the answer to The Supreme Court of Texas' statement that the Supreme Court of the United States has not yet taken the step to review a decision of the state court which merely reverses and remands a case for a new trial on the ground that the verdict is against the great weight and preponderance of the evidence and

that the authorities indicate this step will not be taken."

This Court for a hundred years and in something over a hundred cases has uniformly recognized that Congress' enactment of Section 1257 (and its predecessors) restricted this court to the review of only final state court judgments. Deen does not say that Congress has enacted an amendment to Section 1257 which says "except in F.E.L.A. cases." If this Court meant by the Harsh case that such amendment to Section 1257 exists, we are sure that it would have said so. Deen's assumption throughout the petition for certiorari that there is something in F.E.L.A. litigation that entitles a plaintiff therein to favored treatment is certainly not justified by any language in the Act, nor is it consistent with the doctrine of "equal justice under law." If the Harsh case meant that this Court has jurisdiction in an F.E.L.A. case to grant certiorari in a cause remanded to the trial court for a new trial, it would have said so in clear and unmistakable language, and until this Court does so, we think the bench and the bar have the right to believe that 28 U.S.C.A., Section 1257 confines the granting of certiorari to final judgments of state courts.

The conclusion that the judgment is not final and certiorari should, therefore, be dismissed or denied is inescapable.

ON THE MERITS

If the petition for certiorari is not dismissed because the judgment appealed from is not final or because no federal question is presented, it should nevertheless be denied.

In this same cause Deen has filed a petition for mandamus, and most of the arguments presented there are reiterated in the petition for certiorari. The Santa Fe has filed a reply to that petition, and the same points here presented are presented there in more detail and with more authorities. We particularly ask the Court to consider the argument and authorities contained in the Santa Fe's reply to the petition for mandamus under the headings, "Jurisdiction" and "On the Merits" because by doing so we will be able to shorten this.

I. Deen's statement that the setting aside of a jury's verdict because same is against the overwhelming weight and preponderance of the evidence and ordering a new trial is a denial of his right of trial by jury is not correct. To the contrary, every jurisdiction in the United States has expressly held that the granting of a new trial because of the verdict being against the overwhelming weight and preponderance of the evidence by either the trial court or an appellate court is not a denial of a trial by jury. 50 *C.J.S.* Sec. 128, p. 854; 31 *Am. Jur.* Sec. 17, p. 24. A few of the cases by the Supreme Court of the United States and the circuit courts so holding are:

Sinclair vs. Cooper, 108 U.S. 352, 27 L.Ed. 751, 2 S.Ct. 754;

Metropolitan R.R. Co. vs. Moore, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334;
L. & N. R. Co. vs. Woodson, 134 U.S. 614, 33 L.Ed. 1032, 10 S.Ct. 628;
Montgomery Ward & Co. vs. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189;
Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 32 L.Ed. 854, 9 S.Ct. 458;
L. & N. R. Co. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;
Dimick vs. Schiedt, 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296;
Koenigsberger vs. Richmond Silver Mining Co., 158 U.S. 41, 39 L.Ed. 889, 15 S.Ct. 751;
Daffinrud vs. U. S. (7th Cir.) 145 Fed. 2d 724;
Aetna Casualty & Surety Co. vs. Yeatts (4th Cir.) 122 Fed. 2d 350;
Garrison vs. United States (4th Cir.) 62 Fed. 2d 41;
Mt. Adams & E. P. R. Co. vs. Lowrey (6th Cir.) 74 Fed. 463.

In our reply to the petition for mandamus (p. 8) we have li ted a fair sample of the decisions of the State courts containing the same holding.

In ridiculing the Supreme Court of Texas, Deen's attorney (Petition for Certiorari, p. 15) points out that under Texas law no more than two new trials may be granted. Apparently he is not aware of the fact that the Supreme Court of the United States in *L. & N. Co. vs. Woodson*, 134 U.S. 614, 33 L.Ed. 1032 10 S.Ct. 628. had before it a Tennessee statute con-

taining exactly the same language. In the first trial a verdict in favor of the plaintiff for $3,000.00 was set aside as being against the overwhelming weight and preponderance of the evidence. At the second trial a verdict for the plaintiff in the amount of $5,000.00 was set aside on the same ground. At a third trial the verdict was $3,000.00, and again the judge found that the verdict was against the overwhelming weight and preponderance of the evidence, but by reason of the statute he was prohibited from granting a new trial. The Supreme Court of the United States found nothing unconstitutional about the Tennessee procedure, which is exactly like the Texas procedure, nor was there any denial of a jury trial as guaranteed by anybody's constitution. If the granting of a new trial because the verdict was against the overwhelming weight and preponderance of the evidence was a "denial of a trial by jury" this Honorable Court in the Woodson case certainly held to the contrary.

Petitioner cites *Minneapolis St. P. & S.S.M. Ry. Co. vs. Moquin*, 283 U.S. 520, 75 L.Ed. 1243, 51 S.Ct. 501 (petition, p. 23) and makes a quotation therefrom which is out of context. That case is authority for the very proposition here presented, because in that case the trial court required a remittitur on a finding that the jury's verdict was induced by passion and prejudice. The Supreme Court of the United States held that if the verdict was the result of passion and prejudice, the whole had to be set aside, and ordered that an entire new trial be granted.

II. Deen's statement that a finding by an appellate

court that there was enough evidence to require the submission of an issue to the jury is the same thing as a holding by an appellate court that the verdict is not against the overwhelming weight and preponderance of the evidence is without support in either principle or authority. As a matter of fact, the exact opposite is true. We have been unable to find any court opinion which dealt with the matter and which did not make exactly the distinction which the Texas Supreme Court made in this case. Confining ourselves again to cases by the United States Supreme Court and the federal circuit courts, the following are, we think, a representative sample:

Sinclair vs. Cooper, 108 U.S. 352, 27 L.Ed. 751;

Metropolitan R.R. Co. vs. Moore, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334;

Montgomery Ward & Co. vs. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189;

Daffinrud vs. U.S. (7th Cir.) 145 F. ed 724;

Aetna Casualty & Surety Co. vs. Yeatts, (4th Cir.) 122 F. ed 350;

Garrison vs. United States (4th Cir.), 62 F. 2d 41.

The case by the Supreme Court of the United States which contains the most careful and detailed analysis and the most thorough discussion of this very point is *Metropolitan R.R. Co. vs. Moore* (supra), and is, we think, decisive of Deen's contention. The whole opinion is devoted to this single point, and we make

only the following quotation from it, quoting from 30 L.Ed. p. 1025:

> ". . . It is admitted that according to established rules of procedure in such cases, it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact."

It should be further noted that in the *Moore* case the Supreme Court of the United States did exactly what the Supreme Court of Texas did in this case, remand same to the lower court to consider exactly the same point, that is, whether the jury's verdict was against the overwhelming weight and preponderance of the evidence.

III. Deen's statement that the question of overwhelming weight and preponderance of the evidence was involved in the former petition for certiorari which was granted in this Court is not correct. As shown by the decision of the Court of Civil Appeals on the first appeal (275 S.W. 2d 529), only the question of "no evidence" was considered. This is reiterated in the opinion in the Court of Civil Appeals after the mandate (306 S.W. 2d 171) and in the opinion of the Texas Supreme Court (312 S.W. 2d 933). Not only was the point not decided on the prior hearing in the state courts, but it was not presented or argued in the Supreme Court of the United States. We quote from Deen's petition for certiorari on the former appeal, page 15:

> "The Court of Civil Appeals of Texas, in the *Deen* case, found *there was no evidence to support* the above findings of the jury, and set aside such findings and the judgment of the trial court rendered thereon." (Italics ours.)

The same statement was made with reference to holding of the Texas Supreme Court (Petition for Writ of Certiorari, p. 24):

> "Petition for writ of error in the *Deen* case was filed in the Supreme Court of Texas, March 28, 1955. It was finally overruled April 25, 1956. It took the Supreme Court of Texas one year and one month to decide that the record was *completely devoid of any evidence* to support any findings of the jury in favor of Deen." (Italics ours.)

Therefore, we say that the only matter before the Supreme Court of the United States was the question of "no evidence". It held there was "some evidence." It was not presented with the question of the finding being against the overwhelming weight and preponderance of the evidence.

If it had been presented to the Supreme Court of the United States, that Court, like the Supreme Court of Texas, cannot pass upon an assignment of error based on overwhelming weight and preponderance. It passes only on the law question of "some evidence" or "no evidence."

Illustrative of the authorities supporting the foregoing statement is *Aetna Life Ins. Co. vs. Dunken*, 266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342, which reversed a decision (248 S.W. 165) of the Court of Civil

Appeals at Austin and remanded. Other similar cases after the *Dunken* case are:

Great A. & P. Tea Co. vs. Supermarket Equipment Corp., 340 U.S. 147, 95 L.Ed. 162, 71 S.Ct. 127;

Graver Tank & Mfg. Co. vs. Linde Air Products Co., 336 U.S. 271, 93 L.Ed. 672, 69 S.Ct. 535;

Smiley vs. Kansas, 196 U.S. 447, 25 S.Ct. 289, 49 L.Ed. 546.

Since the Supreme Court of the United States has never passed on the question of "weight and preponderance of the evidence" heretofore and has repeatedly and expressly held that it was without power to pass on the "weight and preponderance of the evidence," the Supreme Court of Texas correctly assumed that the Supreme Court of the United States did not do so in the Deen case. The only issue submitted by Deen, and argued by Deen or the Santa Fe on the former trial, was the sufficiency of the evidence to require the submission of the case to a jury, which is another way of saying that there was enough evidence to raise a jury question. That is, and always has been, a question of law, and the Supreme Court of the United States has always held that it was a question of law, and held that when it had determined that there was enough evidence to require the submission of the case to the jury and to prevent the reversal and rendition by an appellate court, its duties were completed, because the question of the verdict being against the

great weight and preponderance of the evidence was for the lower court.

IV. Deen's statement that a trial of a Federal Employers' Liability case in the state court is not governed by state rules of practice is not correct. This Court has never so held and, as a matter of fact, has held that the election by the plaintiff to try the case in the state court means that it will be tried under state rules of practice:

C. R. I. & P. R. Co. vs. Cole, 251 U.S. 57, 64 L.Ed. 133, 40 S.Ct. 62;

Minneapolis & St. L. R. Co. vs. Bombolis, 241 U.S. 211, 60 L.Ed. 961, 36 S.Ct. 595;

Second Employers' Liability Cases, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327;

M.K.T. Ry. Co. vs. West, 232 U.S. 682, 58 L.Ed. 795, 34 S.Ct. 471;

Central Vermont Ry. vs. White, 238 U.S. 507, 59 L.Ed. 1433, 35 S.Ct. 865;

Seaboard Airline R. Co. vs. Padgett, 236 U.S. 668, 59 L.Ed. 777, 35 S.Ct. 481;

K.C.S. R. Co. vs. Leslie, 238 U.S. 599, 59 L.Ed. 1478, 35 S.Ct. 844;

L. & N. R. Co. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;

L. & N. vs. Stewart, 241 U.S. 261, 60 L.Ed. 989, 36 S.Ct. 586;

C. & N.W. R. Co. vs. Gray, 237 U.S. 399, 59 L.Ed. 1018, 35 S.Ct. 620.

In *Dickinson vs. Stiles*, 246 U.S. 631, 62 L.Ed. 908,

Judge Holmes put it with his usual clarity and brevity, quoting from 62 L.Ed. p. 911:

> "It contemplated suits in state courts and accepted state procedure in advance. Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211, 60 L.ed. 961, L.R.A.1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505; Louisville & N. R. Co. v. Stewart, 241 U.S. 261, 60 L.ed. 989, 36 Sup. Ct. Rep. 586. We see no reason why it should be supposed to have excluded ordinary incidents of state procedure."

This Court has never overruled *Dickinson vs. Stiles*, although it has held that some particular rule of practice destroyed the rights of a plaintiff under the Federal Employers' Liability Act, and hence was unenforceable. It is Deen's contention that state rules of practice have no application to Federal Employers' Liability cases. In his petition for mandamus he suggests that such suits must be tried under federal rules applicable to F.E.L.A. cases in state courts. His exact language (petition for mandamus, p. 11) being:

> "While Deen has never conceded that the Texas appellate courts, *under federal procedure applicable to F.E.L.A.*, had authority to etc."

There are no such rules, and the result is that if the state rules of practice do not apply, then there are no rules of practice, and there is no guaranty that anybody will get a fair trial, plaintiff or defendant.

Our discussion of this same point in the reply to Deen's petition for mandamus (p. 39-44) covers this with more detail. However, we particularly want to

refer to the quotation by Deen (Petition for Certiorari, p. 23) from *M. S. P. & S. S. M. Ry. Co. vs. Moquin*, 283 U.S. 520, 51 Sup. Ct. 501, 75 L.Ed. 1243. The quotation is entirely out of context and the case very strongly supports respondent's position not that of Deen. In that case the lower court had found that the jury's verdict was brought about by "passion and prejudice" and to cure it required remittitur. The Supreme Court of the United States held that, if the jury verdict was the result of "passion and prejudice" a remittitur wouldn't cure it and a new trial was mandatory, State rules to the contrary notwithstanding. In other words, this Court held in the Moquin case that the granting of a new trial was essential to preserve the right of trial by jury. Surely Deen will not take the position that an appellate court in Texas denies a jury trial if it sets aside a verdict because same is against the overwhelming weight and preponderance of the evidence, but that the Supreme Court of the United States did not deny a jury trial when it mandatorily required the verdict be set aside in the Moquin case. Certainly, the Moquin case is not authority for Deen's statement (p. 22):

> "Whether a record under State practice would entitle a party to a new trial is immaterial in Federal cases."

V. Deen's statement that the Court of Civil Appeals in Texas has no jurisdiction to require a remittitur in an F.E.L.A. case and that the only court having jurisdiction to grant or require remittitur in an F.E.L.A. case is the United States Supreme Court

(Petition for Certiorari, p. 25, et seq.) is not correct. In fact the exact opposite is true.

Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854;

Southern Ry. vs. Bennett, 233 U.S. 80, 58 L.Ed. 860, 34 S.Ct. 566;

T. & P. Ry. Co. vs. Hill, 237 U.S. 208, 59 L.Ed. 918, 35 S.Ct. 575;

L. & N. R. Co. vs. Holloway, 246 U.S. 525, 529, 62 L.Ed. 867, 870, 38 S.Ct. 379, 381;

S.L. I.M. & S. Ry. Co. vs. J. T. Craft, 237 U.S. 648, 661, 59 L.Ed. 1160, 1165, 35 S.Ct. 704;

N. Y. Central and Hudston River R. Co. vs. Fraloff, 100 U.S. 24, 32, 25 L.Ed. 531, 534;

New York L.E. & W. R. Co. vs. Winter, 143 U.S. 60, 75, 36 L.Ed. 71, 80, 12 S.Ct.Rep. 356;

Herencia vs. Guzman, 219 U.S. 44, 55 L.Ed. 81, 31 S.Ct.Rep. 135.

For example, in *S.L. I.M. & S. Ry. Co. vs. Craft* (supra) there was an F.E.L.A. trial court judgment for the plaintiff in the amount of $11,000.00, the state Supreme Court required a remittitur of $5,000.00, and the Supreme Court of the United States said (59 L.Ed. p. 1165):

> "* * * the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here."

Deen's position apparently is that *Neese vs. Southern*

Ry. Co. 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60, a per curiam opinion overrules all of the prior adjudications, of which the foregoing are merely a sample, and he concludes, therefore, that no State court has the power to require remittitur and that the sole power to do so is vested in the United States Supreme Court. The obvious answer is that this Court in the Neese case neither held so nor said so. During Prohibition there was a malt product marketed under the name "Near Beer" and it was well said that the man who labeled it "*Near* Beer" was a poor judge of distance. May we say that the Neese opinion bears much less proximity to an opinion overruling the cases we have heretofore cited than "Near Beer" was close to real beer.

VI. Deen's statement that certiorari to the present judgment of the Supreme Court of Texas is indispensable to the protection of his rights is not correct. In the first place, as heretofore pointed out, the Court of Civil Appeals may give him the affirmance of the trial court's judgment which he asks the Supreme Court of the United States to order. Secondly, if Deen's worst fears are confirmed, the case will be remanded for another trial before another jury in Brown County, Texas, the forum selected by Deen for the trial of his case. If at that trial he secures a verdict for twice the amount of the present verdict, there will be no Federal question involved, he will have been unharmed and certainly he wouldn't complain of it or appeal from it. If he gets half as much and is of the opinion that the Court of Civil Appeals and the Su-

preme Court of Texas deprived him of a Federal right on the present appeal, he still has the right thereafter to present exactly the same points he now presents to the Supreme Court of the United States and if he is right, it will be remedied on certiorari at that time. See *Urie vs. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018, among the many cases so holding.

If Deen is right, he can win but he cannot lose. That enviable position would seem to negative any reason for the Supreme Court of the United States to overrule fixed principles and create exceptions. The record shows, as pointed out by the Court of Civil Appeals, that Deen was back working ten months after his injury and at the time of the trial had worked regularly for more than four years. Without going outside the record, we cannot tell the Court what has happened since the trial, but we will be glad to do so upon request. In any event, what is involved here is ten months loss of pay (which the record shows was under $2,400.00), and we point this out to prevent the conjuring up of a picture of a disabled plaintiff who sits starving waiting on a final decision. Deen is working for the Santa Fe and getting paid for it, and no delay would work any more irreparable injury to him than to any other party in any other suit.

Deen's attorneys have repeatedly taken the position that justice to Deen has been unreasonably delayed, pointing out that under the record the man was injured on July 12, 1949, and that it is now 1958. Any implication that this delay is chargeable to the Santa Fe is completely unjustified. The judgment in the trial

court is dated May 12, 1954, almost five years after Deen's injury. Without going completely outside the record, we cannot tell the Court why Deen and his attorneys chose to wait five years to bring his case to trial, but we can, within the record, state that the defendant filed no motion for continuance, and it was not responsible for that five years delay in whole or in part. From May 12, 1954, until the Court of Civil Appeals reversed and rendered this cause on February 4, 1955, the defendant was vigorously and diligently seeking to reverse an unjust and excessive judgment. From the date of the Court of Civil Appeals reversal (February 4, 1955) until April 8, 1957, Deen's attorneys, first by application to the Supreme Court of Texas and subsequently by certiorari to the Supreme Court of the United States, were diligently attempting to reverse the decision of the Court of Civil Appeals. Since April 8, 1957, the railroad company has been seeking to have the cause remanded for another trial. Therefore, seven out of the nine years which have elapsed since Deen was injured must be charged to Deen and his attorneys and only two to the Santa Fe. But if the whole were chargeable to the defendant, it would not alter one principle of law nor make just what is unjust. Speedy justice is the objective of all courts, but no court has ever held that speedy is the noun and justice the adjective.

THERE WAS NO VIOLATION OF THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES

The foregoing negatives every basis which Deen's petition for certiorari has asserted, unless the mandate in the former hearing in this same suit precluded any Texas court from deciding anything. Deen construes the mandate of the United States Supreme Court as being the equivalent of an order to the Court of Civil Appeals to affirm the judgment of the trial court. If it is the equivalent of such an order, we humbly submit that the clerk, in transmitting the opinion of this Court and the mandate, made some typographical errors, because that is not what it says, nor even close to what it says. The cause was remanded to the Court of Civil Appeals for further proceedings. On such a remand, the state court has the right to pass on all matters which the Supreme Court of the United States has not passed on.

The first case to which we wish to refer this Court is *Schneider Granite Co. vs. Gast Realty & I. Co.*, 245 U.S. 288, 62 L.Ed. 292, 38 S.Ct. 125. We make the following quotations from 62 L.Ed., p. 294:

> "A judgment of the supreme court, which had affirmed a judgment of the circuit court of the city of St. Louis sustaining the tax (259 Mo. 153, 168 S.W. 687), *was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court* (240 U.S. 55, 60 L.Ed. 523, 36 Sup.Ct.Rep. 254)." (Italics ours.)
>
> * * *
>
> "These contentions must be tested by the true

intent and meaning of the mandate of this court, and, so tested, both must be overruled. *The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the land-owners under the 14th Amendment, as established by our decision.*". (Italics ours.)

The next case is *Georgia Ry. & Electric Co. vs. Decatur*, 297 U.S. 620, 56 S.Ct. 606, 80 L.Ed. 925, and we quote from 80 L.Ed. p. 927:

"April 29, 1935 (295 U.S. 165, 79 L.ed. 1365, 55 S.Ct. 701), we reversed the decree pronounced by the Supreme Court of Georgia in this cause, September 18, 1934 (179 Ga. 471, 176 S.E. 494), and sent it back for further proceedings not inconsistent with the accompanying opinion.

* * *

"After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants of a federal right. We suggested no interpretation of our own and did not affirmatively indicate the further action to be taken. Schneider Granite Co. v. Gast, 245 U.S. 288, 291, 62 L.ed. 292, 295, 38

S.Ct. 125. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly."

The third case is *Sprague vs. Ticonic National Bank*, 307 U.S. 171, 59 S.Ct. 777, 83 L.Ed. 1184.

That the above cases are still the law is evidenced by the following quotation from Judge Frankfurter's opinion in that case (83 L.Ed. p. 1188):

"But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See Re Sanford Fork & Tool Co., 160 U.S. 247, 40 L.ed. 414, 16 S.Ct. 291; Ex parte Century Indem. Co., 305 U.S. 354, ante, 216, 59 S.Ct. 239."

The above rules and propositions are just as applicable to a Federal Employers' Liability case as they are to any other type of litigation, no matter what appellee says to this Court. For example, we will cite four cases by the United States Supreme Court where, on certiorari from a state court, the Supreme Court of the United States reversed the state court and remanded on substantially the same basis as here involved. Following the decision by the Supreme Court of the United States, the state court decided all issues which were proper under the state practice and which,

of course, were not involved and could not have been passed on by the United States Supreme Court. These are the following:

Ellis vs. Union Pac. R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 27 N.W. 2d 921;

Keeton vs. Thompson, 326 U.S. 689, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 191 S.W. 2d 954;

Pauly vs. McCarthy, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261; after remand to the state court, 184 P. 2d 123;

Stone vs. New York C. & St. L. R. Co., 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441; after remand to the state court, 260 S.W. 2d 532.

When the Supreme Court of the United States wants to preclude the state court from considering assignments it did not pass on, it does so in positive and unequivocal language. That can be demonstrated quickly and conclusively by using only one advance sheet. If the Court will look in the Lawyers' Edition advance sheet for March 11, 1957, it will find five railroad cases, or Jones Act cases, reported. Three of these are cited in the opinion of the Supreme Court of the United States in the Deen case. They are:

Rogers vs. Missouri Pacific R. Co., 353 U.S. 500, 1 L.Ed. 2d 493;

Webb vs. Illinois Central R. Co., 352 U.S. 512, 1 L.Ed. 2d 503;

Ferguson vs. Moore-McCormack Lines, Inc., 352 U.S. 521.

Let us take those three cases and see what the Supreme Court of the United States did when it did in fact consider matters included in the state court brief but not passed on there.

We quote from the *Rogers* case (1 L.Ed. 2d, page 502):

> "We have considered the remaining questions not passed upon by the Supreme Court of Missouri, and find them to be unsubstantial. Accordingly, we remand the case for proceedings not inconsistent with this opinion."

We quote from the *Webb* case (1 L.Ed. 2d, page 507):

> "We have considered the remaining questions not passed upon by the Court of Appeals, and find them to be unsubstantial. Accordingly, we remand the case for proceedings in conformity with this opinion."

In the *Ferguson* case, no discussion of other points was contained in the opinion.

However, in another case decided the same day, *Pennsylvania R. Co. vs. Rychlik*, the concluding sentence (1 L.Ed. 2d, page 490) is as follows:

> "The decision below must therefore be reversed and the case remanded to the District Court with instructions to dismiss the complaint."

As demonstrated by the foregoing cases, all of which are out of one advance sheet, when the Supreme Court of the United States passes on points and wants the judgment of the state court (or circuit court) to

be a certain way, it does not hesitate to say so. In the Deen case, the Supreme Court only passed on the "no evidence" issue and therefore obviously left to the Court of Civil Appeals the decision of all of the other points presented.

In *Ex Parte, The State of Texas*, 315 U.S. 8, 86 L.Ed. 579, the United States Supreme Court had the question of a state court's remanding because the Court of Civil Appeals believed that the jury's finding was against the overwhelming weight and preponderance of the evidence squarely presented to it, following a reversal by the Supreme Court of the United States on certiorari. We quote from 86 L.Ed. page 586:

> "In their return, the Chief Justice and Associte Justices of the Supreme Court of Texas state that that Court 'would have rendered the same judgment if it had based the same solely upon its construction of the State statute and not at all upon its construction of the opinion of this Court.' The return further showed that in remanding the cause to the District Court for a new trial the Supreme Court of Texas acted entirely pursuant to state law: '*The Court of Civil Appeals in this State has full power to set aside findings based on conflicting evidence and believed by it to be against the overwhelming weight and preponderance of the evidence and to remand the case for another trial;* but it is without power to set aside findings based on conflicting evidence and then make its own findings and render judgment thereon.' (Italics ours.)
>
> "We read this return as a disclaimer by the judges of the Supreme Court of Texas of the con-

> struction placed upon their opinion by the petitioners in so far as it touches the scope of this Court's ruling in 304 US 224, 82 L ed 1304, 58 S Ct 883, and the effect of that decision upon the future course of this litigation."

The mandate in the Deen case no more foreclosed further action by the state court than the mandate did in *Ex Parte Texas*.

We have heretofore pointed out that the only matter presented to the Supreme Court of the United States by Deen was the question of "no evidence." We have heretofore pointed out that the Supreme Court of the United States has never heretofore passed on "the overwhelming weight and preponderance of the evidence," and has always refused to do so. We have heretofore pointed out that since the Supreme Court of the United States cannot grant certiorari from causes that are remanded, and since the reversal and remanding because a verdict is against the overwhelming weight and preponderance of the evidence would not be a final judgment, the Supreme Court could not have passed on that issue in this case. Deen, in his petition for certiorari, contends that he did present such an issue to the Supreme Court of the United States. If he did so, and the Supreme Court of the United States passed on it, it presumably would have ordered the judgment of the trial court affirmed. However, even if Deen had presented such point, the Supreme Court of the United States certainly by its opinion did not pass thereon, and what it did not pass on, is no portion of its opinion nor does it preclude the state court from passing on it. For example, we quote

from the case of *Hartford Life Insurance Company vs. Blincoe*, 255 U.S. 129, 65 L.Ed. 549, 41 S.Ct. 276, quoting from 65 L.Ed. page 552:

> ". . . The most that can be said of any question that was decided is that it became the law of the case, and, as such, binding on the supreme court of the state, and to what extent binding is explained in Messenger v. Anderson, 225 U.S. 436, 56 L.ed. 1152, 32 Sup. Ct. Rep. 739. *Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to.* (Italics ours.)
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> "It was urged, it is true, in the brief of counsel, that the assessment 'was void because it included money for taxes erroneously claimed to be enacted [exacted] under the laws of Missouri.' No notice, however, was taken of the contention and no influence given to it or to the effect it asserted. *If it made any impression at all, it was obviously as a state question, dependent upon the state statutes, upon which we would naturally not anticipate the state courts, the case necessarily going back to them.*" (Italics ours.)

Additional authorities are:

Chas. Wolff Packing Co. vs. Court of Industrial Relations of Kansas, 267 U.S. 552, 69 L.Ed. 785, 45 S.Ct. 441;

Mutual Life Ins. Co. vs. Hill, 193 U.S. 551, 48 L.Ed. 788, 24 S.Ct. 538.

Certainly no Texas court has disregarded or misconstrued the mandate of the Supreme Court of the

United States in this same cause. Deen really concedes this (see petition for certiorari, p. 25) when he says:

> "While the mandate of the Supreme Court of the United States did not leave open for further examination by the state court the sufficiency of the evidence to support the jury's conclusion of employer's negligence, it did leave open certain other questions, all of which have now been decided."

Deen follows that with the Texas courts' decision on insufficiency of the pleadings, the incorrectness of the court's charge, and various other matters, including the requiring of a remittitur. When Deen concedes that the mandate left these questions open, he concedes in effect that what he is doing by the present petition for certiorari is asking for a rehearing on the Supreme Court of the United State's prior decision. In his petition for mandamus, Deen takes the position that after the decision by the Supreme Court of the United States there was nothing left (and that there is nothing left now) for the Supreme Court of Texas and the Court of Civil Appeals to do but enter judgment for Deen. That is certainly inconsistent with his recognition of the fact that the remand to the Court of Civil Appeals by this Court on the former appeal left open matters for the decision by that court without violating the mandate. When you boil it all down, Deen's sole basis for saying that the mandate was violated is his contention that a reversal of a holding of "no evidence" is the exact equivalent of holding that the jury's verdict is not against overwhelming weight and preponderance of the evidence.

In other words, there is no distinction and there is no difference. And if there is anything that we have demonstrated, it is that there is a difference and that one is not the equivalent of the other, and that the Supreme Court of the United States and every other court has held unconditionally to the contrary.

We again ask the Court's indulgence, in the interest of saving some space, by referring to the brief presented by the Santa Fe in reply to the petition for mandamus in this same cause, which of a necessity covers many of the same points and covers some of them more in detail than this brief.

For all of the foregoing reasons, we think it clear that, even if this were a final judgment or if a federal question were presented, the Texas courts have not violated the mandate of the United States Supreme Court, and certiorari should therefore not be granted.

SUMMARY

Jurisdiction

Jurisdiction is denied because there is no final judgment of any state court. 28 *U.S.C.A*: Sec. 1257, expressly provides that judgments must be final before certiorari will lie to a state court. The judgment appealed from was a remand by the Supreme Court to the Court of Civil Appeals to determine in turn whether the judgment of the trial court should be affirmed, subject to the remittitur, or whether the judgment of the trial court should be reversed and the entire cause remanded there for a new trial. That, of course, is not a final judgment.

Secondly, the Santa Fe denies that there is any denial of any federal right or any substantial federal question involved. The worst that could happen to Deen is that a new trial would be had. The granting of a new trial is not the denial of any right of jury trial guaranteed by either the state or federal constitution. If there be any error in the decision appealed from and Deen is in any way injured by the re-trial, his right to apply for certiorari thereafter is well established.

On the Merits

I. The granting of a new trial by either the trial or appellate courts because the verdict is against the overwhelming weight and preponderance of the evidence is not a denial of any right of trial by jury.

II. The decision by this Court that there was enough evidence to support a jury's verdict is not a

decision of the question of whether or not the verdict was against the overwhelming weight and preponderance of the evidence. The two matters are entirely different, as pointed out in the decision of the Supreme Court of Texas and as pointed out by the decision of this Court in *Montgomery Ward & Co. vs. Duncan* (supra) and *Metropolitan R.R. Co. vs. Moore* (supra). This Court did not have before it on the former appeal the question of whether or not the verdict was against the overwhelming weight and preponderance of the evidence. The only issue presented by Deen in his petition for certiorari on the former appeal was the question decided by the Court of Civil Appeals, to-wit, that there was "no evidence" to support the jury's verdict of negligence on failure to furnish proper tools. This Court has held many times that it has no jurisdiction to pass upon the issue of "overwhelming weight and preponderance of the evidence"; consequently, since it has no jurisdiction to pass thereon, it certainly did not pass thereon on the former appeal, particularly when the issue was not presented by Deen.

III. Deen's position that a trial in a state court under the Federal Employers' Liability Act is to be had in accordance with the Federal Rules of Procedure is not correct. An F.E.L.A. plaintiff who elects to file his suit in a state court simultaneously elects to be bound by state practice and procedure, and this Court has so held repeatedly.

IV. The Court of Civil Appeals of the State of Texas is, under the Constitution of the State of Texas, vested with the power to require a remittitur to cure

an excessive verdict. There is nothing in the Federal Employers' Liability Act which denies a state court such power, and, as a matter of fact, the Supreme Court of the United States has many times held that such power is vested in the state court, where the action is brought in a state court, and that the Supreme Court of the United States has no jurisdiction to review the exercise of the discretion so vested in the state court.

The Mandate

Since the Supreme Court of the United States did not pass on the issue of "overwhelming weight and preponderance of the evidence" and certainly did not pass on the excessiveness of the jury's verdict, the mandate to the Court of Civil Appeals, on the former appeal, left these questions open, and there was no disregard of the mandate in this cause.

CONCLUSION

WHEREFORE, premises considered, the respondent, Gulf, Colorado and Santa Fe Railway Company, respectfully prays that certiorari be dismissed or, in the alternative, that it be denied.

Respectfully submitted,

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I certify that a copy of the foregoing respondent's reply to petition for certiorari has been mailed on the 4 day of June, 1958, to the petitioner's attorneys, as follows: to Mr. David M. McCord, 519 Mercantile Bank Building, Dallas 1, Texas; and to Messrs. Johnson, Guthrie & Stanfield, 1608 Mercantile Bank Building, Dallas 1, Texas.

Luther Hudson